United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

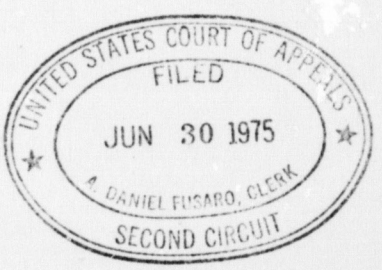
75-4021

B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS; WARNER BROTHERS, INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA, INC. AND TWENTIETH CENTURY FOX TELEVISION; SANDY FRANK PROGRAM SALES, INC.; WESTINGHOUSE BROADCASTING COMPANY, INC.; CBS,INC.,	
Petitioners,	
v.	Docket Nos.75-4021 75-4024, 75-4025 and 75-4026
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,	
Respondents,	
AMERICAN BROADCASTING COMPANIES, INC., et al;,	
Intervenors.	

PETITION FOR REHEARING BY THE COURT IN BANC



17

PETITION FOR REHEARING BY THE COURT IN BANC

Sandy Frank Program Sales, Inc., by its attorneys, hereby respectfully petitions the Court for a Rehearing In Banc in the above matter, in accordance with Rules 35 and 40 of the Federal Rules of Appellate Procedure. In support whereof the following is shown:

A. Introduction

1. Frank respectfully requests the full Court to rehear the above matter with respect to the lawfulness of the effective date of September 8, 1975, which the Federal Communications Commission (FCC) specified for the latest revision of its Prime Time Access Rule (PTAR). As will be pointed out in greater detail below, this issue has been before the Court twice and has been resolved by different panels in contradictory ways. We therefore urge the full Court to use the rehearing process "to secure or maintain uniformity of its decisions" (F.R. App. P.35) and to "resolve a conflict between decisions by different panels of the Court". Appeals to the Second Circuit (1971) prepared by the Committee on Federal Courts, The Association of the Bar of the City of New York, p.42.

2. In effect, the second panel which just recently passed upon this issue has overruled the panel which decided the same question last year. The latter discussed the matter

at length and carefully explained the reasoning underlying its ruling. The latest panel has issued only a one sentence order which merely denied the requests of Frank and other access time producers and syndicators for an order in consonance with the 1974 ruling on the question of the lead time necessary before changes in the rule can be made effective. Thus it did not explain its rationale for reaching a result inconsistent with the ruling of the earlier panel - indeed, it did not even indicate that it had done so.

3. Frank respectfully requests the full Court to act promptly on this Petition and to grant the relief sought herein. The Court is nearing the end of the term, and the rule changes here in issue are scheduled to go into effect on September 8, 1975. If Frank and others similarly situated are to be given the critically important lead time required by the terms of the earlier panel's thoughtful decision, very prompt decision will be required.

4. The FCC adopted the original version of the Prime Time Access Rule (PTAR I) on May 4, 1970, but in order to give affected parties time to adapt to the changes involved the Commission did not make the rule effective until October 1, 1971 - and on reconsideration deferred the effectiveness of part of the rule for another twelve months, 23 FCC 2d 382, modified on reconsideration, 25 FCC 2d 318, 336-337, affd sub nom Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971). The rule, among other things, limited to three hours per night, in the prime time period from 7:00 to 11:00 p.m., the amount of programming an affiliated

television station could take from its network. This was designed to curtail the three networks' stranglehold on the market for new national programming and to develop independent producers and distributors of programming for access time.

5. On February 6, 1974, the Commission - after a rule making proceeding lasting fifteen months - drastically revised the rule and undertook to make the changes effective on September 1, 1974. 44 FCC 2d 1081. A number of parties petitioned this Court to review that decision, and Frank participated in the appeal as an amicus curiae. On June 18, 1974, a panel consisting of Judges Hays and Oakes of this Court and Judge Christenson of the District Court for the District of Utah, issued an opinion which did not rule on the merits of the appeals but held that "the Commission failed to allow adequate time for the amendments to become effective" - and therefore ejoined the Commission "from making the amendments effective before September 1975". National Association of Independent Television Producers and Distributors v. FCC , 502 F 2d 249, at 251 (2d Cir. 1974).

6. The Court's 1974 decision did not direct the Commission to hold further hearings, but simply remanded the case to permit the agency to "specify precisely what the effective date should be". However, it said that the FCC might "choose to utilize the additional time available to it to reconsider its changes in the rule". Further, it called the Commission's attention to "certain policy issues raised by the petitions", and suggested that the views of the

Department of Justice and various public interest groups be obtained. 502 F2d 249, at 255. The Commission did hold further hearings, in which Frank and many other parties participated - including the entities suggested by the Court's June 18, 1974 decision. As a result of these proceedings the Commission, on January 17, 1975, issued a decision (PTAR III) which abandoned PTAR II and essentially returned to PTAR I It thus made just as sharp a change in direction as it had attempted on February 6, 1974, but despite the Court's June 18, 1974 decision as to lead time, the FCC specified that these drastic adjustments in its earlier policy position should be effective on September 8, 1975. 50 FCC 2d 829.

7. Frank and other producers and distributors of access programming sought review, in these proceedings, of the Commission's PTAR III decision because of the short lead time allowed and the carving out of an exemption from the rule for children's, documentary, and public affairs programs. Still other parties challenged the whole PTAR concept and objected, in particular, to PTAR III's provision with respect to feature films. On April 21, 1975, a panel consisting of Judges Friendly and Gurfein of this Court and Judge Bartels of the Eastern District of New York issued a decision which generally affirmed PTAR III and, with certain exceptions, denied the petitions for review - but remanded the matter for further consideration by the FCC in conformity with the Court's opinion. National Association of Independent Television Producers and Distributors v. FCC, ____F2d ____ (2d Cir. 1975).

8. The Court's April 21, 1975 decision, unlike its earlier ruling of June 18, 1974, dealt with the merits of the substantive challenges to PTAR III - but did not discuss or dispose of the contentions of Frank and others that the September 8, 1975 effective date did not provide adequate lead time for the affected parties and was inconsistent with the Court's decision of June 18, 1974. All the Court said with regard to this issue is found in its concluding paragraphs, as follows:

> "In view of the remand, with which the Commission should deal expeditiously, we leave it to the Commission to determine when its modified Rule is to become effective.
>
> The Commission should consider, in conjunction with its new effective date, a ceiling on total hours allowed for the exempted network programs in the light of the number of independent programs for first-run syndication then available for early production.
>
> This panel will retain jurisdiction for review of the new effective date fixed and matters related thereto.
>
> Remanded to the FCC for further consideration in conformity with this opinion." (Emphasis added)

This clearly indicates that the effective date specified in the FCC's Order of January 17, 1975, was not to control because the Commission was told to "redetermine" when the rule changes should become effective and was directed to fix a "new effective date". It is also clear that the panel retained jurisdiction primarily for review of the effective date which was to be fixed by the Commission on remand.

9. However, the Commission did not proceed in accordance with the above statements of the Court - or with the earlier decision of June 18, 1974. On May 14, 1975, it issued a further decision in which it disposed of the substantive issues remanded to it for further consideration - but it declined to fix a new date, again specifying the September 8, 1975 date it had set last January.

10. Frank and the National Association of Independent Television Producers and Distributors (NAITPD) promptly asked the panel, which had retained jurisdiction, to hold the FCC to the standards adopted by the earlier panel by requiring it to defer effectiveness of the substantial changes in direction involved in PTAR III until the fall of 1976. On May 15, 1975, Frank filed a pleading captioned Motion Of Sandy Frank Program Sales, Inc., For Order Enjoining The Commission From Making PTAR III, As Further Revised By The Commission, Effective Prior To The Beginning Of The 1976-1977 Television Season. A copy of this pleading - with a supporting Statement (including and Affidavit of Sandy Frank, the President of Petitioner) - is attached hereto as Attachment A to demonstrate the substantial nature of the matter at issue. NAITPD filed a 29 page Motion For Review Of Commission Action On Remand which was supported by affidavits on behalf of four of its producer members. The FCC filed a 10 page Opposition; National Broadcasting Company, Inc., filed a 31 page Memorandum opposing the requests

of Frank and NAITPD, supported by a 13 page excerpt from its March 3, 1975 Brief on the substantive merits of the PTAR III appeals and by a 6 page affidavit by one of its officers; and CBS, Inc., submitted a 2 page letter in opposition. On May 30, 1975, Frank filed a 23 page Reply To The Oppositions and NAITPD submitted a 4 page letter in lieu of a Reply. Thereafter NBC submitted two letters with respect to the matter here in issue, NAITPD responded to one of those letters, and the FCC provided the Court with copies of one of its orders denying requests for waiver and referring to the question of the effective date for PTAR III.

11. We cite this chronology of pleadings to demonstrate that major parties to these appeals regarded the Commission's action on remand with respect to the effective date of the rule changes as vitally important and made substantial submissions to the Court with respect to it. In response to all of this, Judges Friendly and Gurfein signed an Order on June 17, 1975 which, apart from the caption, read in full as follows:

> It is hereby ordered that the motions made herein by counsel for the Sandy Frank Program Sales and National Association of Independent Television Producers and Distributors petitioners dated May 15, 1975 to review the Federal Communications Commission's Third Report and Order, particularly to the extent that it specifies September 8, 1975 as the effective date for an exemption from the prime time access rule for childrens, documentary, and public affairs programs be and it hereby is denied.

12. Quite aside from our disappointment at the result reached, we are deeply disturbed by the panel's summary disposition of such a critically important matter

without any discussion or explanation whatever - even though it had on its own motion expressly retained jurisdiction "for review of the effective date fixed" as well as other matters with respect to which it had remanded the case to the FCC. The abruptness of this action stands in striking contrast to the thoughful decision of the earlier panel which carefully reviewed the record and presented a reasoned basis for its conclusion that a lead time of sixteen months was required for substantial changes in the Commission's policy as to prime time access- a conclusion which is directly contradicted, and in effect overruled, by the second panel's one sentence Order of June 17, 1975. Frank submits that this situation clearly calls for rehearing by the full Court and resolution of the conflict between the two panels - hopefully in favor of the sound and fully supported ruling of the earlier panel. Frank further respectfully requests that such action be taken as promptly as possible because of the imminence of the effective date specified by the Commission and left undisturbed by the second panel.

B. Argument

13. We believe we can best present our case on the issue of the Commission's obligation to provide a reasonable lead time when fixing the effective date for significant changes in a rule, which will adversely affect parties who have relied on the old rule, by quoting the

first panel's treatment of this issue in its entirety. This appears at 502 F2d 253-255 and reads as follows:

> [1] NAITPD and Time-Life Films have attacked the effective date of the new rule as unreasonable because it does not give independents who have produced programs for access time in reliance on the rule sufficient opportunity to withdraw from these ventures without unnecessary expense. We agree.
>
> The FCC first mentioned the September 1974 effective date in its informal report of January 24, 1974. The Commission formally adopted that effective date in its Report and Order of February 6, 1974. Thus the parties will have had notice of the effective date for only eight months or less.
>
> [2,3] The FCC claims that the effective date is unassailable because it complies with section 4(c) of the Administrative Procedure Act, 5 U.S.C. §553(d) (1970), which provides that a regulation may be made effective "not less than 30 days" after publication. As the language of the statute indicates, this provision merely establishes a minimum period of notice. It does not authorize the use of an effective date that is arbitrary or unreasonable. Cf. 5 U.S.C. §706(2)(A) (1970).
>
> In its Report the Commission noted that Warner Bros., and MCA had urged that immediate repeal of PTAR was feasible, while others had proposed a notice period much longer than eight months. Report ¶¶75,76,44 FCC 2d at ___. The Commission decided to make the changes effective in September 1974. Id. ¶113,44 FCC 2d at ___. The Commission based this decision on a finding that "the public interest is served by making improvements in any rule effective at a reasonably early date" and that a lengthy lead time was unnecessary "in view of the limited expansion of network programming which we have decided to permit." Id. 44 FCC2d at ___.
>
> In promulgating the original rule the Commission allowed a much longer grace period. The Commission permitted the networks sixteen months to phase out their domestic syndication and foreign distribution activities. 23 FCC2d at 399. This enabled the networks to dispose of their inventories of re-runs without incurring larger losses. The Commission also allowed sixteen months before making PTAR effective. Id. On reconsideration of its original order the Commission postponed for a further year the prohibition on off-network programs and feature films "to permit ample time for changeover." 25 FCC 2d at 334-35.
>
> The Commission has not shown that the public interest in making rule changes effective "at a reasonably early date" and the need for lead time are any different in this proceeding

than they were in promulgating the original rule.

The evidence before the Commission strongly indicated that a longer lead time would be desirable. First, by reducing access time from fourteen to six or fewer half-hours per week the Commission sharply restricted the market for programs produced by independents for access time. Even if the Commission's claim that the modifications are not great is correct with respect to the networks, the modifications have a very great impact on the independents producing for access time. This is especially true for one hour shows planned for access time. It may prove very difficult to market these shows at all. The longer grace period permitted the networks to cushion the adverse impact of the original rule should also have been granted the independents in this case.

The networks themselves (including NBC and CBS, both of which advocate total repeal of the rule) testified that program planning begins twelve to eighteen months before the start of the season and that a shorter lead time would produce lower quality network programming. This directly contradicts the Commission's claim that a shorter time would be in the public interest. We note also that the uncertain status of the revised rule pending this appeal may well have further delayed network planning, thereby further reducing the possibility that quality network programming will be ready by September 1974.

The position of Warner Bros. and MCA concerning the effective date of the amended rule must be viewed in the light of their position as to what substantive changes should have been made. They demanded total repeal of PTAR, and of the ban of feature films in particular, on the ground that it was inimical to the public interest. The Commission rejected that argument and indeed strengthened the ban on feature films. Having rejected the substantive proposals, the FCC can hardly give great weight to views of Warner Bros. and MCA on when the modifications adopted by the Commission should become effective. 8/

Thus virtually all the relevant testimony recommended a longer grace period than the Commission allowed.

The Commission contends that a rule is not invalid merely because it has retroactive consequences or modifies pre-existing interests. The Commission relies primarily on General Telephone Co. v. United States, 449 F2d 846,863-864 (5th Cir. (1971). But the court in General Telephone found that petitioners

---

8/ Moreover, in proceedings concerning the original rule, MCA claimed that it needed about one year to prepare a program series. 25 FCC2d at 335.

there should not have relied on the Commission's acquiescence in their activities because the Commission had for many years hinted that it might curtail those activities. Id. In the present case petitioners had good reason to rely on their status under the rule. The FCC did not merely acquiesce in petitioners' activities, it invited and encouraged them. Part of the avowed purpose of PTAR was to urge independents to produce programs for prime time and to foster a healthy syndication industry.9/ Notice of intent partially to reverse this policy came only eight months before the effective date. Having justifiably relied on the Commission's prior policy, petitioners are entitled to more opportunity to adjust to the new rule.

[4] The court in General Telephone made it clear that a rule with retroactive consequences must be reasonable.10/ Any implication by the FCC that this court may not consider the reasonableness of the retroactive effect of a rule is clearly wrong.11/

We conclude that any effective date earlier than September 1975 would be unreasonable because it would cause serious economic harm to independent producers and because it gives networks inadequate time to plan additional programming. We remand the case to permit the Commission to specify precisely what the effective date should be. (Emphasis added)

9/ See 23 FCC2d at 386, 395

10/ "Where a rule has retroactive effects, it may nonetheless be sustained in spite of such retroactivity if it is reasonable." 449 F2d at 863 (emphasis added). "[T]he Commission should be enabled to remedy the problems . . . by retroactive adjustments, provided they are reasonable." Id. (emphasis added).

11/ As the Supreme Court stated in SEC v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1581, 91 L.Ed. 1995 (1947):

> "[S]uch retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See Addison v. Holly Hill Co., 322 U.S. 607, 620, 64 S.Ct. 1215 1222, 88 L.Ed. 1488."

13. It stands to reason that the same problems were posed by the Commission's effort to make the substantial changes involved in its PTAR III order of January 17,1975 effective on September 8,1975-and that the same considerations that moved the first panel in dealing with PTAR II should have applied here Indeed, its decision of June 18, 1974 was the law of the case on this point. Frank urged this position in its Brief and Reply Brief on the merits - as well as in its Motion and its Reply to Oppositions in the wake of the Commission's May 14 , 1975 order adamantly adhering to the September 8,1975 effective date. But the second panel has apparently not even addressed the issue- at least there is no reasoned analysis or statement of position in either its decision of April 21,1975 or its Order of June 17, 1975 with respect to the question of whether September 8, 1975 is an appropriate date on which to make the latest rule changes[1/] effective, in light of the Court's decision of June 18,1974. Perhaps the second panel disagrees with its predecessors' ruling or believes that the present situation can be distinguished from that involved in the earlier case - in either event, they should have given a reasoned statement of the bases for their conclusion - which they have not done. Or perhaps they do not believe the issue is important - despite the strong showings to the contrary made by Frank[2/] and the members of NAITPD. If so, it should have explained its reasoning - but it has not done so. We submit that the second panel has either ignored the first panel's ruling on this precise

---

1/ It should be noted that the Commission has made significant changes in the rule as recently as May 14, 1975.

2/ See Frank's Statement, submitted on February 6, 1975 in support of NAITPD's request for a stay, which is a part of Attachment A hereto.

point or has attempted to overrule it sub silentio - all the while ignoring the threat of grave injury to Frank and others like it who have relied on PTAR I and tried to implement the public interest objectives the Commission sought to achieve by adopting the rule.[3/]

14. That threat is real and serious! Frank is not engaging in a philosophical exercise here, or discussing policy for policy's sake. There is a great deal riding on the question of whether the Commission can be held to the standards set by the first panel when it comes to fixing the effective date for the PTAR III changes - and this issue may well arise later in connection with further changes in PTAR. Frank has undertaken to provide a new access program for the 1975-1976 television season which will add diversity to the access time period. In addition, this program is of network quality and therefore involves higher costs- and greater risks - than many other access programs. Frank was so far committed to this program by the time of the Commission's decision of January 17, 1975 that it had to go ahead with the project.[4/] Although it has had some success in getting clearances for the new program, Frank has been unable to get time periods in vitally important major markets like Boston, Detroit, Atlanta and a number of others. This is due largely to the fact that PTAR III will operate to reduce the access

---

3/ As we pointed out at pp.10-12 of Frank's Motion which is Attachement I hereto, the public has a substantial interest in reasonable regard for the private interests of the access producers and distributors. If the Commission is allowed to force rule changes upon the industry without the lead time the first panel found to be necessary the economic viability of those to whom the public must look for independent programming free of network dominance may be seriously impaired.

4/ Frank was forced to at least defer its plans for another new high quality program of a different type because of the PTAR III changes.

time periods by at least 14.3%, and the Commission obdurately insists in imposing this cut on far less notice than the 1974 panel of this Court found to be necessary and in the public interest. If the full Court will rehear this matter and grant the relief we are seeking, Frank and all others like it will be able to go ahead during the next season under the rule as it existed when they made plans for that season[5/] - and can then adjust, for the following seasons, to the problems which PTAR III will impose upon them.

D. Conclusion

15. As is pointed out at length in Frank's Motion of May 15, 1975 (Attachment I hereto), the Commission - although it at least addressed the effective date issue, unlike the second panel - has offered no new arguments of substance which would justify its disregard of the Court's decision of June 18, 1974, which considered and rejected earlier versions of the same thing.. Its only new contentions were based on private, undisclosed, and obviously quite minimal "studies" which the Commission itself describes as "limited" and "inexact - and which neither the parties nor the Court can review or evaluate. Thus neither the Commission, nor those parties (NBC and CBS) which support it, nor the second panel which has refused to review its action has offered any valid basis for ignorning or distinguishing the original ruling of the first panel of the Court in June, 1974.

5/ In making its plans for the 1975-1976 television season, Frank assumed that any changes the Commission might make in PTAR as a result of further proceedings it instituted in response to the Court's decision of June 18, 1974, would be made effective in accordance with the ruling therein as to required lead time. We think such reliance was reasonable and equitably entitles Frank to the relief it seeks here.

WHEREFORE, Frank respectfully requests:

(1) That the full Court address this matter as promptly as possible in view of the imminence of the September 8, 1975 effective date imposed by the FCC and the approaching end of the Court's current term;

(2) That the full Court rehear this matter in banc and require the FCC to comply with the first panel's ruling of June 18, 1974;

(3) That if for any reason this matter cannot be disposed of promptly, the Court stay the effective date of PTAR III until it has an opportunity to rule.

Respectfully submitted,

SANDY FRANK PROGRAM SALES, INC.

By Kenneth A. Cox
Kenneth A. Cox

William J. Byrnes
William J. Byrnes

Its Attorneys

AND

By Ashbrook P. Bryant
Ashbrook P. Bryant
Associate Counsel

Haley, Bader & Potts
1730 M Street, N.W.
Washington, D.C. 20036

(202) 659-7676

June 27, 1975

ATTACHMENT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS; WARNER BROTHERS, INC., COLUMBIA PICTURES INDUSTRIES, INC., MGM TELEVISION, UNITED ARTISTS CORPORATION, MCA, INC. AND TWENTIETH CENTURY FOX TELEVISION; SANDY FRANK PROGRAM SALES, INC.; WESTINGHOUSE BROADCASTING COMPANY, INC.; CBS, INC.,	)	
Petitioners,	)	
v.	)	Docket Nos. 75-4021, 75-4024, 75-4025, and 75-4026
FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,	)	
Respondents,	)	
AMERICAN BROADCASTING COMPANIES, INC., et al.,	)	
Intervenors.	)	

MOTION OF SANDY FRANK PROGRAM SALES, INC.
FOR
ORDER ENJOINING THE COMMISSION FROM MAKING
PTAR III, AS FURTHER REVISED BY THE COMMISSION,
EFFECTIVE PRIOR TO THE BEGINNING OF THE
1976-1977 TELEVISION SEASON

Pursuant to the Court's retention of jurisdiction in this matter, Sandy Frank Program Sales, Inc. (Frank), by its attorneys, respectfully moves the Court for the entry of an order directing the Commission not to specify an effective date for PTAR III, as recently further modified in accordance with the Court's decision of April 21, 1975, any earlier than the beginning of the 1976-1977 television season. In support whereof the following is shown:

1. In its Brief (pp. 86-93) Frank urged the Court to rule that the Commission's action in attempting to make PTAR III--released on January 17, 1975--effective on September 8, 1975 was inconsistent with the Court's decision of June 18, 1974 on an earlier appeal of this matter, was arbitrary and unreasonable, and was therefore unlawful.

2. The Court did not address this issue in its decision of April 21, 1975 because it directed the Commission to fix a "new effective date" and retained jurisdiction "for review of the effective date fixed and matters related thereto." We assume the Court found it unnecessary to resolve that issue because it intended the matter to be addressed in connection with the new effective date it instructed the Commission to fix. However, the Commission has not complied with the Court's directive but, instead, has insisted upon the same date specified in its Second Report and Order of January 17, 1975. Frank's earlier arguments referred to above are therefore still fully relevant to this important issue--indeed, even more so for the reasons specified below. Frank therefore respectfully reasserts those arguments and requests the Court to consider them in disposing of this matter, incorporating its earlier statements by this reference as fully as if set forth in full herein. (Brief, pp. 86-93).

3. The Commission's action borders on contumacy. The Court, in its earlier decision of June 18, 1974 (National Association of Independent Television Producers and Distributors

v. FCC, 502 F.2d 249), was faced with an effort by the Commission to make rule changes released on February 6, 1974 effective September 1, 1974. The Court disposed of this issue as follows:

--It noted that: "In promulgating the original rule the Commission allowed a much longer grace period. The Commission permitted the networks sixteen months to phase out their domestic syndication and foreign distribution activities. . . . The Commission also allowed sixteen months before making PTAR effective. . . ." (502 F.2d at 254).

--It found that: "The Commission has not shown that the public interest in making rule changes effective 'at a reasonably early date' and the need for lead time are any different in this proceeding than they were in promulgating the original rule." (Id.)

--It ruled that: "The longer grace period permitted the networks to cushion the adverse impact of the original rule should also have been granted the independents in this case." (Id.--emphasis added.)

--It therefore decreed: "We conclude that any effective date earlier than September 1975 would be unreasonable because it would cause serious economic harm to independent producers and because it gives networks inadequate time to plan additional

programming." (502 F.2d at 255; see, also, at 251). The Court thereby required the Commission to fix an effective date which would give the affected parties at least fifteen months lead time from the date of its decision--and nineteen months from the release of the Commission's order. That holding is the law of the case. There is nothing in the record which supports a lesser lead time for the independent access producers, and the Commission has not articulated any sound reason for its disregard--in both its January 17, 1975 and May 13, 1975 orders--of the Court's clear directive. (See Frank's Brief, pp. 90-93, with respect to the Commission's flagrant evasion of the Court's order in Par. 64 of the agency's January 17, 1975 order.)

4. Certainly, the Commission's latest order does nothing to justify its bullheaded insistence on fixing an effective date to suit itself rather than one designed to comply with the Court's decisions. Although it discusses this matter at greater length (Pars. 6-14) than it did in its January 17, 1975 order, the Commission gives no valid reason for disregarding the Court's clear directives.

5. The Commission begins by simply saying that it has "concluded" that the Rule--in its still further revised form--should be put into effect on September 8, 1975, which is not the "new" date contemplated by the Court but the same old date it undertook to fix in its January 17, 1975 order. As pointed out in our Brief (pp. 87-89), that date did not

give the necessary lead time from January 17th, and it gives affected parties even less time to adjust in the wake of the Court's decision of April 21, 1975 and the Commission's new order of May 13, 1975. The Commission continues to refuse to accept the Court's ruling in its June 18, 1974 decision that the agency must give interested parties at least sixteen months lead time to prepare to conduct their affairs in accordance with rule changes in this area.

6. The Commission says it reached its conclusion as to the effective date for three reasons: "(1) the importance of bringing to the public at an early date the public interest benefits intended by PTAR III, and (2) the limited degree of impact on the availability of access time to non-network sources of new material and the resultant small likelihood of undue harm to producers and distributors of independent programming, and (3) the absolute protection to access programs, especially hour-long programs and local material, on Saturday night, which we are affording by our actions herein." The first two of these were urged by the Commission in support of its rush to make PTAR II effective on September 1, 1974--but they were rejected by the Court in its decision of June 18, 1974. In addition, the second point simply involves a self-justificatory conclusion of the Commission purportedly reached on the basis of private investigations by its staff which neither the parties nor the Court can evaluate properly--and it disregards evidence which

Frank and others had supplied to the agency. The third "basis" makes no sense at all. Producers and syndicators for access time had "absolute protection" on Saturday night under PTAR I, so the Commission is not conferring any new benefit which can justify its rush to impose limitations upon the opportunities for independent program production which PTAR I was designed to create.[1/]

7. With respect to its first point the Commission says (Par. 7) that it decided last January (1) that the new exemption is necessary "to facilitate the presentation of important material of certain types (children's programming, documentaries and public affairs) whose showing is inhibited by the rule as it now stands" and (2) that these benefits "should be brought to the public at an early date." In the first place, the record in this proceeding does not support the statement that PTAR I has "inhibited" the showing of the FCC-favored program types because the kind of children's programs the Commission is talking about ("programs primarily designed for children aged 2 through 12"), documentaries, and public affairs programs were not presented significantly in prime time before PTAR I and so have not been curtailed by the rule. The only criticism of the rule's operation in

---

1/ It is interesting to note that the Commission, although it later explains its reasons for barring use of its new exemptions on Saturday night (Pars. 20-22), never expands on this point as a purported justification for the short lead time it has provided--though it makes a one-line reference to it in Par. 13. It appears to have been thrown in as a make-weight--which, in fact, provides no rational basis for the Commission's action.

this area which is to be found in the record is the complaint of some parents that the networks' occasional children's specials, when they are presented at 8:00 p.m. EST, are offered too late for convenient viewing by some small children. As we pointed out in our Brief (pp. 50-60), the Commission could have dealt with this problem without changing the rule in the slightest--and without causing adverse impact on station licensees, access producer/distributors, public interest groups, etc. All it had to do was to say that the networks, on evenings when they plan to present children's programming, should begin their three hour block of prime time at 7:00 or 7:30 p.m. EST and leave the balance of the 7:00 to 11:00 p.m. period to be programmed by the local licensees.[2/]

8. But the shorter answer to this claim is that the Commission made it in support of the abbreviated lead time it tried to impose in connection with PTAR II and this Court rejected the argument in its decision of June 18, 1974. The Commission tries to obscure this by quoting that decision, from a passage dealing with an entirely different matter, to support what it claims--completely without foundation--to be a "general principle" that the benefits of a new policy

---

2/ We recognize that the Court has said that it was not its province to require the Commission to follow this alternative. Without agreeing with it, certainly that conclusion does not require the Court to accept the Commission's choice as an excuse for a separate and drastic assault on the producers and distributors of access programming--namely, the imposition of an unreasonably short lead time in implementing the rule changes.

should be made available to the public at an early date. It requires a high order of effrontery thus to misapply what the Court actually held in NAITPD v. FCC. It noted that:

> The Commission based this decision [to make PTAR II effective on about seven months notice] on a finding that "the public interest is served by making improvements in any rule effective at a reasonably early date" and that a lengthy lead time was unnecessary "in view of the limited expansion of network programming which we have decided to permit." Id. 44 FCC2d at ____. (502 F.2d at 254)

The Court rejected both contentions and held that a minimum lead time of sixteen months should have been provided. In some inexplicable way the Commission purports to find support in that decision for its refusal to comply with its ultimate holding. At the same time, it also ignores the Court's directive in its recent decision of April 21, 1975, that the Commission should specify a "new" effective date.

9. The Commission still insists that it is entitled to change the rule on any notice it pleases because its new rul[illegible] a "better" one which will benefit the public--despite the Court's clear holding that it must give affected parties at least sixteen months lead time. As we pointed out in our Brief (p. 91), presumably every rule change is an improvement and, therefore, in the public interest--but that does not absolve the Commission from the obligation to allow reasonable lead time before those affected must comply. PTAR I brought benefits to the public but the Court has held that the sixteen months the Commission allowed there was the appropriate minimum period before effectuating the changes. Some rules

can be put into effect very quickly because they do benefit the public but do not adversely impact on anyone. But the Commission has always delayed the implementation of rule changes where immediate effectuation would injure private parties. In other words, it has balanced injury to private parties against the benefits the public will derive from the change--and has consistently made reasonable allowance for the former. For some unaccountable reason it simply will not do so here, thus necessitating the injunctive order we seek here.

10. The rest of the Commission's discussion of this issue (Pars. 8-13) is devoted to an attempt to support its claim that the rule changes will have limited impact on the producers and distributors of independent programming.[3/] The short answer to all its twistings and turnings is that they are irrelevant. The question is not whether the Commission believes--on the basis of what it concedes to be "limited inquiry"--that a certain number of access programs will succeed in the face of a September 8, 1975 effective date. It concedes that evaluation in this area is "inexact" and "difficult"

3/ In Par. 14 the Commission throws in another make-weight argument, claiming that early effectuation of the rule will avoid the need to consider requests for waiver of the rule as to individual off-network programs which it says has long been a problem. It is, of course, a problem of the Commission's own making, and the Court has quite properly expressed disapproval of the practice because it borders on pre-censorship. But no matter how quickly the rule changes are put into effect, there will still be requests for waivers. The proper course will be for the Commission to deny them--as it should have done from the start. However, this has nothing to do with the effective date issue.

and that it "is not easy to predict" how many programs will go into production. It is for that reason that the Court, in its June 18, 1974 decision, dealt with the issue in an entirely different way. It looked at the question of the lead time the networks would require to produce quality programming and at the lead time the independent producers would need to adjust to changes in the rule. See 502 F.2d at 254-255. It summarized the record by saying: "Thus virtually all the relevant testimony recommended a longer grace period than the Commission allowed." 502 F.2d at 255. It reviewed the time the Commission had allowed the parties when it adopted PTAR I in 1970 and ruled that that longer period--sixteen months--"should also have been granted the independents in this case". 502 F.2d at 254. There is nothing in the record since June 1974 to support a different result, and the Court's ruling--and the logic supporting it--must still be controlling.

11. The Commission (Par. 9) states its "judgment" that the early provision of what it conceives to be the benefits of the rule changes "outweighs whatever disadvantages may result to those private interests which may be affected". It is all well and good to contrast public benefit against private interest, but it should be remembered that the public interest groups--which surely bespeak the public's interests more directly and more accurately than the Commission can--strongly urged, with one exception, that PTAR I be retained

and strengthened. The "private interests" of the independent producers and distributors are important to them, of course, but are also of vital importance to the public. If the Commission does not administer the rule with reasonable regard for the private interests of the access producers and distributors, there will be no viable and continuing source of non-network television programming to serve the public's needs. The Commission says nothing of the "private interests" of the networks which are certainly advanced by the PTAR III changes--and which are already in a much more healthy state than those of the access program industry. Nor does it discuss the "private interests" of the owners of syndication rights to motion pictures and off-network programs which can, by some stretch of the imagination, be called children's programs or documentaries. The Commission still says that the Prime Time Access Rule serves an important aspect of the public interest. It is inescapable that the public's interest in independent sources of national television programming will not be served unless reasonable consideration is given to the private interests of those entities which have tried to implement the Commission's PTAR policies. That is why the Court, in its June 18, 1974 decision, required a substantial lead time--at least fifteen months--to cushion the adverse impact changes in the rule would have upon the independents.

12. That degree of protection is still vitally needed by the independent production and distribution industry. The

Commission's action here is capricious and arbitrary in that it will subject Frank and others similarily situated to substantial--perhaps disastrous--financial and economic injury without any commensurate or off-setting benefit to the public. Frank has urged repeatedly, and in the strongest terms of which it is capable, that to make the contemplated changes in PTAR effective prior to the beginning of the Fall 1976 television season will inevitably involve serious financial and business injury to Frank and others like it and may well subject them to economic disaster. To postpone the effectiveness of the modifications, on the other hand, will cause no demonstrated injury to others and, as far as the public is concerned, would only delay the changes the Commission believes necessary in the public interest for a year--which is shorter than the delay the Commission quite properly provided for when it first brought to the public the benefits of PTAR I. But as pointed out above, the public also has an interest--and we believe it is a greater interest--in the viability of independent program production which would be enormously enhanced by giving the access programmers and distributors adequate lead time to adjust to the changes the Commission seeks to make.

13. The devastating impact on Frank and his peers of making the contemplated modifications to the rule effective sooner than September 1976 is spelled out in detail in the Affidavit of Sandy Frank and Statement of Sandy Frank Program

Sales, Inc. in Support of Petition for Stay (February 6, 1975) in Case No. 75-4021 before this Court. We attach that Statement and Affidavit to this motion as Appendix A for ready reference. We urge this Court to consider the matters contained therein because they are highly relevant to the proper disposition of this motion. The facts and circumstances set forth in Appendix A not only are very important to the furtherance of the basic interest of the public in an expanded and viable television program market but also are critical to the basic interests of the movant and its peers and to their ability to serve the public interest in strong and stable sources of independent television programs. Similar showings have, of course, been made to the Commission and the Court by other independent producers and distributors.

14. Damage to the public interest by postponing the proposed modifications of PTAR to afford the industry adequate time to adjust to new conditions in program markets is highly speculative and amorphous. Indeed, there is nothing in the record to show that the effect will be of any consequence at all. On the other hand, substantial financial injury, if not economic disaster, to Frank and other producers and distributors from premature effectiveness of the rule is certain and inevitable, as shown by Frank's affidavit. In these circumstances simple justice and equity, as well as a correct balancing of interests--public and private--require reasonable delay in the effectiveness of the new modifications of PTAR--

until September 1976.

15. There is nothing in the Commission's latest order which adequately meets these showings. Instead of referring to the record discussed by the Court in its June 18, 1974 decision, the Commission has taken the unusual step of making a "limited" and completely private inquiry which is not spred upon the public record so that Frank and others could comment on it--or supplement or rebut it. It is nice to have the Commission conclude that Frank's own efforts will probably be successful, but we think Mr. Frank's views on this subject should be given greater weight.

16. Indeed, the Commission's whole approach to this issue is not only misdirected--as pointed out above--but is also, no doubt unintentionally, basically misleading. The agency purports to identify or account for old and new access programs which it guesses will be available for the 1975-1976 television season--in part, perhaps, on the basis of information furnished by Frank itself to assist the staff in responding to the Court's interest in regard to "the number of independent programs for first-run syndication then available for early production." But this is all a very iffy business--as the Commission concedes--and confirms the wisdom of the Court's alternative approach in its June 18, 1974 decision as discussed above. The Commission's discussion of this matter is very confusing. It seems to admit (Par. 12) that some eight of the twenty-four programs carried in access time in more

than three markets in early 1975 will either definitely not be in production for the fall of 1975 or their situation is questionable. Of the twelve to fourteen new shows it has identified as being "in reasonably definite form as of early spring 1975",[4/] it ends up being reasonably sure of success for only five. This kind of speculation is certainly even less reliable than the projections of Frank and other independent producers and distributors as to the impact on their individual operations of early implementation of PTAR III which the Commission dismisses collectively--and without any discussion or analysis--as being "substantially speculative." (Par. 13). Again, the Court's wisdom in fixing a sixteen month lead time on the basis of the planning, production, and selling cycles of the affected parties is underscored. Any other course is, indeed, rather speculative--but the Commission is speculating with the fate of others, and with the public's interest in a healthy and growing syndication industry.[5/]

4/ This is a useless classification. There were many more new programs offered in January-February, 1975 and the fact that they were not put into "definite form" was no doubt largely due to PTAR III and the Commission's announced intention to put it into effect on September 8, 1975. Thus the Commission's approach involves a self-fulfilling prophecy. It claims there won't be much impact on access programming from early implementation of PTAR III because the threat of such early effectuation has already sharply cut down the number of programs widely offered. In addition, if there is to be a viable access program industry, more programs must be marketed than achieve the degree of success the Commission is tabulating here.

5/ We addressed the Commission's renewed claims that the parties have been on notice of its intentions since mid-November, 1974 in our Brief at pp. 88-89. Its new suggestion that the (footnote cont.)

17. In order to comply with the Court's decision of June 18, 1974 the Commission should have fixed a "new" effective date at least sixteen months from the Court's decision of April 21, 1975--or not earlier than August 21, 1976. Indeed, since significant matters will not be fully resolved--and the parties will thus not be completely informed of the ultimate shape of the rule with which they will have to comply--until the Court passes on the Commission's latest modifications of the Rule on remand, it can be argued that the sixteen months lead time should run from the Court's final decision in this matter. However, it is in the interest of all concerned to get the status of the Prime Time Access Rule settled after years of controversy and uncertainty. The August 21, 1976 date indicated above ties in with the beginning of the 1976-1977 television season (presumably sometime in September 1976). Frank therefore believes that an effective date of not earlier than the beginning of that season should

---

5/ (footnote cont.) claimed losses would occur "at whatever time the rule goes into effect" is simply unsound. If business men know sufficiently in advance that conditions are definitely going to change at a fixed future date, they can adjust their plans so as to avoid, or at least minimize, resulting losses. Nor should the Commission worry unduly about the "equities" of the networks. They always have need for new programs, and if they do not use particular shows in September 1975 they will certainly get their money's worth later on. And as the Commission knows, the networks are in excellent financial health--there is no question as to their viability and ability to serve the public interest. Indeed, of course, at least two of them had been so successful that PTAR I was adopted to curtail their dominance of national television program production. The Commission often seems to forget this.

be fixed by the Court in order both to give independent producers and distributors of access programming reasonable time to adjust to the new rules and to put all concerned--networks, producers and syndicators for access time, and station licensees--upon notice that the revised rule will be effective in the fall of 1976 and not before.

18. Frank also requests oral argument on this Motion. As indicated above, the Court did not pass on the question of the effective date of the rule changes in its April 21, 1975 decision, presumably because it intended the Commission to fix a new date. This is a very important part of the whole case, and in view of the Commission's intransigence on the issue it merits oral argument.

WHEREFORE, for the reasons set forth above and in its earlier briefs, Frank respectfully requests the Court:

1. To pass upon the propriety and validity of the substantive changes in PTAR III made by the Commission on remand;

2. To enjoin the Commission from making the rule, as thus modified, effective prior to the beginning of the 1976-1977 television season; and

3. To permit oral argument on this motion.

Respectfully submitted,

HANDY CRANK PROGRAM SALES, INC.

By Kenneth A. Cox
Kenneth A. Cox

HALEY, BADER & POTTS
1730 M Street, N.W.
Washington, D. C. 20036

(202) 659-7676

William J. Byrnes
William J. Byrnes

Its Attorneys

May 15, 1975

AND

By Ashbrook P. Bryant
Ashbrook P. Bryant
Associate Counsel

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

National Association of Independent Television Producers and Distributors,	)	
Petitioner,	)	
v.	)	Case No. 75-4021
Federal Communications Commission and the United States of America,	)	
Respondents.	)	

STATEMENT OF SANDY FRANK PROGRAM SALES, INC.
IN SUPPORT OF PETITION FOR STAY

Sandy Frank Program Sales, Inc. (Frank), by its attorneys, hereby respectfully submits its statement in support of the Petition for Stay filed with the Court on January 30, 1975 by the National Association of Television Producers and Distributors (NAITPD) and shows as follows:

A. Statement of Its Interest

1. Frank is a distributor of syndicated television programming and has benefited greatly from the Prime Time Access Rule (PTAR) as adopted by the Federal Communications Commission (FCC) in 1970. It filed similar comments on March 5, 1974 in support of a Petition for Stay filed by NAITPD on February 28, 1974 in Case No. 74-1168, an earlier review of another order of the FCC modifying the PTAR, and thereafter participated as amicus curiae in oral argument on the merits of that earlier appeal.

2. Since the Court's remand in that case in accordance with its decision of June 18, 1974, Frank has participated actively in further proceedings before the FCC. It is aggrieved by the Commission's Second Report and Order in its Docket No. 19622 adopted January 16, 1975 (FCC 75-67) which NAITPD is seeking to have reviewed and has asked this Court to stay. Frank is filing its own Petition for Review of that order concurrently with the filing of this statement and intends to seek consolidation of the two appeals.

B. Reasons For a Stay

3. The reasons which make the granting of a stay imperative are set forth in the attached Affidavit of Sandy Frank. As there pointed out--and in NAITPD's Petition--the parties to this proceeding are caught in almost exactly the same trap as they were last year, as the following table demonstrates:

	PTAR II	PTAR III
FCC Public Notice of Intended Decision	November 29, 1973	November 15, 1974
Issuance of Decision	February 6, 1974	January 17, 1975
Effective Date	September 1974	September 1975

This Court found the lead time given in connection with PTAR II unreasonably short, and the same arguments militate against allowing the Commission to bull ahead with its insistence on again subjecting interested parties to the same risks--and actual losses.

4. In its decision of June 18, 1974, this Court noted that the Commission, in promulgating the original rule, allowed the networks sixteen months to phase out their domestic syndication and foreign distribution activities and also allowed the same period before making PTAR effective (in fact, the ban on off-network re-runs was not made effective for twenty-eight months). The Court then concluded:

> The Commission has not shown that the public interest in making the rule changes effective "at a reasonably early date" and the need for lead time are any different in this proceeding than they were in promulgating the original rule.
>
> * * *
>
> The longer grace period permitted the networks to cushion the adverse impact of the original rule should also have been granted the independents in this case.

The Court thus gave its sanction to sixteen months as the minimum reasonable period for implementing significant changes in the PTAR.

5. Frank and other access producers and syndicators have relied on that ruling. The Commission issued a Further Notice Inviting Comments on July 9, 1974, in pursuance of the Court's remand. It called for comments on or before August 16, 1974 and reply comments on or before August 30, 1974, but those dates were later extended to September 20, 1974 and October 10, 1974. It was obvious from the outset that the Commission could not complete its further consideration of the PTAR and make any changes it might adopt effective in the September 1975 television season because to do so

would violate the Court's ruling. Frank so advised the FCC in Paragraph 110 of its comments filed September 20, 1974:

> We think it is clear that the Court has held that fifteen or sixteen months is the minimum lead time which must be allowed--both for the networks and for the independent access time producers--before any changes in the rule are effectuated. It is clear that the Commission cannot conclude this phase of these proceedings until late this fall. As a consequence, it is obvious that the rule changes cannot now be made effective, at the earliest, before the beginning of the 1976-1977 fall television season. To comply with the Court's ruling, we believe that, at the very least, the Commission should now announce that no rule changes will be made effective earlier than the fall television season beginning not less than sixteen months after the Commission adopts a further order in this proceeding, and that order has either not been appealed or has been finally affirmed by the courts. Only in this way can those who have relied--and who continue to rely--on the existence of the rule be assured that they will be given adequate notice of the effective date of changes in the rule and reasonable lead time to adjust to those changes.

6. Frank therefore went ahead with its plans for arranging for production of new programs to be distributed by it in the season beginning in September 1975, in the belief that any changes the Commission might make in the PTAR could not be made effective earlier than September 1976--and probably not until after that. It had no reasonable alternative to this course, unless it was willing to simply try to market existing programs or to go out of business. It thus embarked on the complex process of program development which, as Mr. Frank points out in his affidavit, led to the necessity of making binding commitments shortly before the Commission issued its January 17, 1975 order.

7. It is true that the Commission, in its

November 15, 1975 Public Notice of instructions it had issued to its staff, said that it intended to make the changes effective September 1, 1975. But that was just nine and a half months away, and Frank--already involved in planning for the September 1975 season--did not see how the Commission could hold to that schedule in the light of the Court's ruling and of well-known facts about the lead time necessary to develop television programs. Furthermore, Frank and others undertook efforts to persuade the Commission to modify its instructions in significant ways--specifically including an effort to induce it to delay implementation of the rule changes to September, 1976 in order to allow plans already underway for the fall 1975 season to be carried out. This effort met with encouragement from members of the Commission and its staff. Not until the order was issued on January 17, 1975 did Frank learn that the Commission had disregarded its pleas and was trying, in the face of all reason and the clear injunction of the Court, to force premature compliance with the changes made.

8. Frank has already been injured by the Commission's order--and its imminent effective date--because the incursions into access time which the rule changes will allow have hampered its efforts to sell its programs for next fall's season. Indeed, the very uncertainty as to <u>how much</u> time the networks will occupy, <u>what</u> time they will choose, and what off-network programs will qualify for the exemptions to

the rule compound the problem, because stations simply do not have the data on which to make firm decisions. If the FCC's order is not stayed in the immediate future, Frank will suffer irreparable harm and may be forced to abort the production of two new programs it plans to distribute next fall. Such an outcome could prove a serious threat to this small company.

9. There is no basis at all, in the record before the Commission, for rushing to make the rule changes effective next September. While the opponents of the rule take the position that it should be totally abolished immediately--a course the Commission has rejected, finding continuance of the rule to be in the public interest--they make no showing of any need for immediate implementation of the changes. They have not shown that they, or the public, will be injured if the changes are not put into effect until September 1976. Their efforts to argue that the access programmers and producers have been on notice of the changes they face since the FCC's Public Notice of November 29, 1973--preceding its order of February 6, 1974--is vitiated by the fact that the Commission has further considered the rule and has now come out with a completely different set of changes.

10. In fact, the public is best served if major changes in policy--no matter how desirable--are implemented in such a way, and at such time, as not unnecessarily to harm innocent parties who have conducted their affairs in

accordance with the old rules and policies. For example, the FCC on January 31, 1975 released a Second Report and Order in Docket No. 18110 in which it concluded a proceeding begun on March 27, 1968 to consider its rules relating to multiple ownership of broadcast stations--and, in particular, their ownership by newspapers published in the same community. The Commission concluded that it is not in the public interest to permit new cross-ownership situations to develop, and found that existing cross-ownerships should be broken up in a limited number of cases where the only station and the only newspaper are co-owned. But it specified that such divestiture would not be required for five years. The public interest at stake is as important as that involved here, yet the Commission allowed not just a reasonable, but a really generous, period for parties to come into compliance with its policy. It should be required by the Court to show a similar measure of concern and understanding for those whose efforts to implement the Commission's policies set forth in the PTAR have now exposed them to risk of irreparable harm if the agency's effort at unduly hasty implementation of its rule changes is not stayed.

11. So the public interest will be served if those who have produced and distributed many of the programs they have been enjoying in access time are allowed a reasonable period in which to adjust to the new order of things. That will allow them to avoid losses which might imperil their

ability to continue to program the part of access time the Commission still thinks should be cleared for independently produced programming. And it will allow the networks the full lead time they need to develop new programming for any new time periods they may be allowed to fill, and will permit their affiliated stations to make an orderly transition from the present form of the rule to the rule as the Commission thinks it should now be changed.

C. Conclusion

12. For the reasons set forth above and in the attached Affidavit of Sandy Frank, we urgently request the Court to grant the Petition for Stay pending the outcome of the appeal filed by NAITPD and the one we are filing contemporaneously with this Statement. Such action will maintain the status quo while the Court considers the appeals on their merits. Frank believes NAITPD has demonstrated substantial likelihood that it will prevail on the merits of its appeal and expects itself to be able to show that the Commission has committed reversible error in its Second Report and Order adopted January 16, 1975. The Court should allow the normal time for the briefing and presentation of these important issues. Then when it rules on the merits, it will be in a position to fix a reasonable time for implementing any part of the challenged changes which it may

find to be valid.

Respectfully submitted,

SANDY FRANK PROGRAM SALES, INC.

By Kenneth A. Cox
Kenneth A. Cox

HALEY, BADER & POTTS
1730 M Street, N.W.
Washington, D. C. 20036

(202) 659-7676

William J. Byrnes
William J. Byrnes

Its Attorneys

February 6, 1975

AFFIDAVIT OF SANDY FRANK

SANDY FRANK, being first duly sworn, on oath states as follows:

I am the President of Sandy Frank Program Sales, Inc., a distributor of television programs for the access time period, with offices at 635 Madison Avenue, New York, New York 10022. I am submitting this affidavit in support of the Petition For Stay heretofore filed in the Court by the National Association of Independent Television Producers and Distributors (NAITPD). My company has participated actively over the past year in trying to persuade the Federal Communications Commission (FCC) to restore and retain the Prime Time Access Rule (PTAR) as originally adopted in 1970. We petitioned for reconsideration of the FCC's January 1974 order seriously curtailing the PTAR, and participated as amicus curiae in the appeal of that order to the Court of Appeals for the Second Circuit. After the Court's remand of the matter, we filed Comments and Reply Comments in response to the FCC's Further Notice of Proposed Rule Making and submitted additional views to the Commission after the issuance of its Public Notice last November announcing the changes it intended to make in the PTAR.

In all of these filings we have strongly urged the Commission to be careful, in implementing any changes in the PTAR, to allow all parties who would be affected thereby reasonable lead time before such changes are made effective.

In particular, when the FCC had not followed up its Public Notice of November, 1974 by issuing its final report and order in December, 1974 as it said it would, we sent mailgrams to all the members of the FCC and to two of its key staff members on January 15, 1975 urging them, in the strongest terms, that they must not try to make any changes in the PTAR effective in September 1975 or January 1976, but that it was critically important that any such changes not be implemented until September 1976 in order to protect those who had been forced to go ahead with business commitments in the meanwhile against serious injury. The statements hereafter set forth in this affidavit parallel and expand upon the contents of those mailgrams. Our position in those mailgrams was echoed by similar messages from at least eight other independent producers and/or distributors of access programming who communicated their views to the FCC at our suggestion and request.

The root of the problem is that even if the FCC had adopted its revisions to the PTAR last November when it issued its Public Notice giving a brief outline of its intended conclusions, a September 1975 effective date would not have given the parties enough lead time. The networks need sixteen months notice and could not have begun to make specific plans for new programming until they knew what the FCC had decided to do. And producers and distributors for access time had already begun to make plans for the fall 1975

television season since they also require substantial lead time and had not been given any clear information as to what the Commission was going to do, and when it was going to do it.

This difficulty was compounded when the FCC failed to come out with a decision in December 1974, as it had said it would. Late December and the first two weeks of January are a critical stage in the cycle of developing programs for access time. The National Association of Television Program Executives (NATPE) normally meets in early February--this year starting February 7, 1975 in Atlanta. It is vital that a distributor of access programs be in a position to sell his programs for the following fall at that convention--and it is important, in that connection, that he be able to pre-sell one or more network owned-and-operated stations beforehand in order to lend credibility to his sales effort. Faced with the scheduled time for the NATPE Convention--and not having gotten a final decision from the Commission--my already difficult position became untenable and I had to commit my company to two major new non-game access half-hour programs. These will be of network caliber, involving very high production budgets, and so represented a very heavy commitment for my company. I so advised the Commissioners in my mailgram of January 15, 1975. The release of the FCC's order on January 17, 1975 came too late for me to avoid undertaking the obligations incident

to the production of these two programs--indeed, I had expended substantial time and money on planning these programs even before the Commission's November 1974 Public Notice and so would have been badly hurt even if the Commission had kept its announced schedule for issuing its final order. But by delaying that order till January 17, 1975--and then trying to make the rule changes effective just nine months later in September 1975--the Commission is exposing my company to irreparable injury, which can only be avoided by granting the stay requested by NAITPD.

In other words, my company--along with other syndication and production organizations--had to make irreversible commitments on the assumption that, with this delay in release of the official language fleshing out the November 1974 Public Notice, the status quo would have to continue in the fall 1975 season because of lack of turn-around time which producers, distributors, and networks would need to adjust to any reduction in the number of access half-hours which might be entailed by the changes the FCC had indicated it intended to make. In view of my years of experience in the program syndication industry--and my understanding of the Court's decision of last June--I did not see how the Commission could rationally impose the changes in September 1975, even though it had suggested such an effective date in its November 1974 Public Notice.

To have risked delaying any longer in committing

for the fall 1975 season would have been to court disaster competitively in launching my company's two new series, which had been in the planning stages for months. The NATPE Convention and the access program selling season for next fall were already on top of us and we had to act. Thus we and other producers and distributors have had to finalize plans on the expectation that the full forty-two access half-hours in each of the Top 50 television markets (14 half hours on each of three network affiliated stations) would still be available next fall. The modifications the Commission has made cut into those critically important time periods and thereby endanger the development of a viable access time production/syndication industry. While the incursions are not as serious as those the FCC adopted in January 1974, it appears that the networks will probably try to program an hour of children's programming on Sunday night as soon as they can--although by their own testimony they will not have had enough lead time to do a proper job by September, 1975. In addition, they will presumably offer one or two half-hours each week devoted to public affairs and/or documentary programs. If each network offers four half-hours of programming each week under the exemption for childrens, public affairs and documentary programs, that will mean the removal of twelve half-hours in each market from the time now available to access programmers. That represents some 28.5% of the total time the PTAR opened

up for programs from independent sources and which had not gone through the three-network "funnel". Clearly that would have serious repercussions for all those who have undertaken to implement the Commission's policies as reflected in the original PTAR. It would lead stations to stick to the already established hit access shows at the expense of newer and more diversified forms of programming which are in the works for fall 1975 start.

Even if the networks eventually do not decide to move into that many of the access time periods, the effects of letting the Commission try to implement its changes next fall will be disastrous. Since the decision was delayed so long, even the networks will not be able to adjust adequately by September 1975. Based on past experience, they will not be able to advise their affiliates of their specific plans for next fall--which they will have to put together with undesirable haste--until they hold their traditional May affiliate meetings some four months hence. This means that the 150 network-affiliated stations in the Top-50 markets will find it almost impossible to buy programming for access time until their networks clarify their plans as to <u>what</u> they intend to do in any additional time which they may be allowed to program--and <u>when</u> they intend to schedule it. This will seriously disrupt my efforts, and those of other access producers and syndicators, in trying to make sales for next fall. It will produce chaos not only in the production and

syndication industries, but in the program departments of the stations as well.

There was no showing, in the last round of comments in the PTAR proceeding, of any need--or, indeed, any great desire--for a fall 1975 effective date. Based on the realities of the broadcasting industry, there is really no logical reason for rushing to implement change announced at such a late date--almost the same time, in fact, as the Commission issued its order in January 1974 which the Court remanded because of the agency's unreasonable haste in trying to put the modifications into effect. After the Commission issued its Public Notice last November announcing its intended changes in the PTAR, my company and others tried to impress upon it the need for adhering more closely to the full rule as adopted in 1970. We believed that we were being given a serious hearing on these matters, since it is well known that the FCC often modifies its decisions in the final stages of considering them. So none of us knew what the outcome was going to be until January 17, 1975--which was too late.

There is another reason for delaying the effective date of the changes the Commission has adopted. My company and others have urged the Commission to strengthen the PTAR by barring the multiple exposure of episodes of the same programming in access time. The Commission, in its January 17, 1975 order, declined to act on this request on the ground that it was outside the scope of the proceeding--since it had not

been included in the original notice. We therefore intend to petition the FCC to initiate a separate rule making proceeding to achieve our objective. If there is, indeed, to be a reduction in the time cleared for access programming, then it is urgent that the changes in the rules should not be made effective until the offsetting protection of an anti-multiple exposure rule is available. Since it is highly unlikely that the separate rule making proceeding can be completed in time to be properly effectuated by next fall, the changes adopted in the January 17, 1975 order should be deferred until the other proceeding has been concluded.

Respectfully submitted,

_____
Sandy Frank

Subscribed and sworn to before me this ____ day of February, 1975.

_____
Notary Public in and for the State of New York, County of _____.

My Commission expires _____.

CERTIFICATE OF SERVICE

I, Kenneth A. Cox, a member of the bar of this Court, hereby certify that copies of the foregoing PETITION FOR REHEARING BY THE COURT IN BANC were served this 27th day of June, 1975, by mailing true copies thereof, by United States mail, postage prepaid, to the following parties:

Joseph A. Marino, Esq.
Associate General Counsel
Federal Communications Commission
Room 500
Washington, D. C. 20554

Ms. Katrina Renouf
Ms. Margot Polivy
Renouf, McKenna & Polivy
1532 Sixteenth Street, N.W.
Washington, D. C. 20036
Counsel for NAITPD

Bernard G. Segal, Esq.
Jerome J. Shestack, Esq.
Peter S. Greenberg, Esq.
Schnader, Harrison, Segal & Lewis
1710 Packard Building
Philadelphia, Pennsylvania 19102
Counsel for National Broadcasting Company, Inc.

Howard Monderer, Esq.
National Broadcasting Company, Inc.
1800 K Street, N.W.
Washington, D. C. 20006

J. Roger Wollenberg, Esq.
Ms. Sally Katzen
Timothy B. Dyk, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D. C. 20006
Counsel for CBS Inc.

James A. McKenna, Jr., Esq.
Thomas N. Frohock, Esq.
McKenna, Wilkinson & Kittner
1150 - 17th Street, N.W.
Washington, D. C. 20036
Counsel for American Broadcasting Companies, Inc.

Donald E. Brown, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10022
Counsel for National Committee of Independent Television Broadcasters and Lorimar Prods.

John D. Lane, Esq.
Hedrick & Lane
1211 Connecticut Avenue, N.W.
Washington, D. C. 20036
Counsel for Westinghouse Broadcasting Company

Stuart Robinowitz, Esq.
Paul, Weiss, Rifkind, Wharton & Garrison
345 Park Avenue
New York, New York 10020
Counsel for Warner Bros., Inc., United Artists Corporation and MGM Television

Benson H. Begun, Esq.
711 Fifth Avenue
New York, New York 10022
Counsel for Columbia Pictures Television

Thomas E. Kauper, Esq.
Assistant Attorney General
Antitrust Division
Department of Justice
Washington, D. C. 20530

Sidney Schreiber, Esq.
James Bouras, Esq.
522 Fifth Avenue
New York, New York 10036
Counsel for Motion Picture
Association of America, Inc.

Arthur Scheiner, Esq.
Wilner & Scheiner
2021 L Street, N.W.
Washington, D. C. 20036
Counsel for MCA, Inc. and
Twentieth-Century Fox Television

Kenneth A. Cox

Kenneth A. Cox